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v. *Evans*, 1 Hagg. Cons. 35, 105. See 3 WIGMORE, EVIDENCE, § 2081. However, it is still laid down as an arbitrary rule by many courts. *Hinmarsh's Case*, 2 Leach, 4 ed., 569; *Regina v. Hopkins*, 8 C. & P. 591; *Ruloff v. People*, 18 N. Y. 179. See STARKIE, EVIDENCE, 9 ed., 758 [862]. Though the rule is defended as a protection of the innocent prisoner, it is submitted that less rigid rules can secure adequate protection. Again, it is difficult to see what principle requires that the fact of crime be established by direct evidence when its agency may be established by circumstantial evidence. *Thomas v. Commonwealth*, 14 Ky. L. Rep. 288, 20 S. W. 226. Such an inflexible doctrine puts a premium on cleverness in crime, making a conviction impossible whenever the criminal succeeds in completely destroying the body of his victim unwitnessed. See *United States v. Gilbert*, 2 Sumn. 19, 27. Finally, a confession is direct evidence. True, it is often of no great weight when uncorroborated. See CHAMBERLAYNE, BEST, EVIDENCE, §§ 563-577; HEALY, PATHOLOGICAL LYING, 23 and cases 20, 23, 25. If made in court, however, it will alone support a conviction. See 1 GREENLEAF, EVIDENCE, § 216. It would seem, therefore, that an extrajudicial confession, when corroborated, should be able to support a conviction without further proof of the *corpus delicti*. See *State v. Lamb*, 28 Mo. 218, 230; 19 HARV. L. REV. 469.

EVIDENCE — DOCUMENTS — FAILURE TO PROVE LOSS OF PRIMARY EVIDENCE — NEGLIGENT LOSS OF ORIGINALS. — The defendant sought to introduce into evidence a copy of a written contract, the original of which he claimed had been mislaid and was therefore unavailable despite diligent search. The trial judge excluded the copy. *Held*, that the exclusion was proper on the ground that the original was negligently lost. *Missouri, Oklahoma, etc. Co. v. West*, 151 Pac. 212 (Okl.).

Early cases and writers on evidence believed that the necessity of producing originals to prove documents as such was but an aspect of the general maxim which they regarded as one of the fundamental rules of evidence, that the best evidence procurable in the nature of the case should be presented. See THAYER, PRELIM. TREATISE ON EVIDENCE, 484-497. With this conception they readily decided that the profferer's negligence in rendering a document unavailable could not be made an excuse for violating a maxim supposed to be at the root of the law of evidence. See *Thomas v. Thomas*, 2 La. 166, 168. See GILBERT, EVIDENCE, 7 ed., 84; BULLER, NISI PRIUS, 252; 3 BL. COMM., 368; SWIFT, EVIDENCE, 31. In reality, however, the best evidence rule is an outgrowth of the ancient mode of trial by production of documents, which later developed into a rule of oral pleading requiring proffers of writings declared on, and finally emerged as a narrow rule of evidence, that was extended to all written instruments because of its excellent sense. See THAYER, PRELIM. TREATISE ON EVIDENCE, 484-507. Thus the history and nature of the doctrine reveal no basis for the early view that documents cannot be proved as such if negligently lost by the profferer. *Rodgers v. Crook*, 97 Ala. 722. Exclusion of secondary evidence should be confined to those cases where originals were rendered unavailable purposely to avoid producing them. *Riggs v. Tayloe*, 9 Wheat. (U. S.) 483. See *Blake v. Fash*, 44 Ill. 302; *Bagley v. Eaton*, 10 Cal. 126, 149; *Breen v. Richardson*, 6 Colo. 605, 607.

EVIDENCE — DOCUMENTS — SECONDARY EVIDENCE: NOTICE TO ACCUSED TO PRODUCE PRIVILEGED DOCUMENTS. — In a trial upon a charge of sending obscene literature through the mails, the district attorney was allowed to read before the jury a notice to the defendant to produce certain "decoy letters" sent to the defendant and also a letter written by him in reply thereto, all of

which were then in the defendant's possession. *Held*, that this is error, though not prejudicial. *Hanish v. United States* (not yet reported).

For a full discussion of the principle involved, see NOTES, p. 221.

EVIDENCE — OPINION EVIDENCE — DOES THE OPINION RULE APPLY TO DYING DECLARATIONS. — In a trial for voluntary manslaughter, a dying declaration of the deceased, to the effect that the defendant had killed him "on purpose," was admitted over the defendant's objection that it was opinion evidence. *Held*, that the admission was proper. *Pippin v. Commonwealth*, 56 S. E. 152 (Va.).

It is a general rule that only such testimony as would have been admissible from the deceased if he were a witness is admissible as his dying declaration. *Whitley v. State*, 38 Ga. 50, 70. This would generally exclude opinions. See 1 GREENLEAF, EVIDENCE, 16 ed., § 159. Accordingly, the opinion of the deceased as to the defendant's fault in killing him is excluded in many states. *Berry v. State*, 63 Ark. 382, 38 S. W. 1038; *Kearney v. State*, 101 Ga. 803, 29 S. E. 127; *State v. Sale*, 119 Ia. 1, 92 N. W. 680. *Contra*, *Gerald v. State*, 128 Ala. 6, 29 So. 614; *Boyle v. State*, 105 Ind. 460, 5 N. E. 203. There seems to be a general feeling in all the cases that opinion as such should be excluded; many courts which admit accusations of the deceased as dying declarations construing the accusation as a method of indicating a complex set of facts. *Commonwealth v. Mathews*, 80 Ky. 287, 12 S. W. 333. It has been argued that the reason for the opinion rule, which is to leave the drawing of inferences to the jury when the facts from which the witness drew his opinion can be detailed to them, does not apply to dying declarations, where it is impossible to put the jury in possession of the facts. See 2 WIGMORE, EVIDENCE, § 1447. But as the opinion rule is also based largely on the fear that opinions of witnesses will unduly prejudice the jury, an objection to which accusations like those in the principal case are especially open, it seems wise to exclude such declarations whenever, in the opinion of the trial judge, the danger of prejudice outweighs their probative value. Abuse of the trial judge's discretion should then be the only ground for reversal.

EVIDENCE — *RES GESTAE* — WHETHER STATEMENTS CHARACTERIZING ADVERSE POSSESSION ARE HEARSAY. — On the issue of whether X.'s possession of certain land was adverse, testimony that X. had said, while in possession, "that she made an exchange . . . in which she got the land now in dispute," was held inadmissible. *Oahu Ry. Co. v. Kaili*, 22 Hawaii Adv. 673.

The court subscribed to the accepted doctrine that the declarations of a person in possession of land as to the nature of his claim are part of the *res gestae*. *McConnell v. Hannah*, 96 Ind. 102. Nevertheless it excluded the testimony on the ground that it was merely narrative of a past transaction. *Wilkinson v. Bottoms*, 56 So. 948 (Ala.); *Whitaker v. Whitaker*, 157 Mo. 342, 354, 58 S. W. 5, 8. But the use of the term "narrative" as a limitation to the *res gestae* doctrine means "non-contemporaneous with the act characterized." Cf. *Rockwell v. Taylor*, 41 Conn. 55, 59-60; *Carter v. Buchannon*, 3 Ga. 513, 517-18; *Commonwealth v. Hackett*, 2 Allen (Mass.) 136, 139; *Sorenson v. Dundas*, 42 Wis. 642, 643. See 1 GREENLEAF, EVIDENCE, § 110; 3 WIGMORE, EVIDENCE, § 1756 (c). In the principal case, as the words in question characterize a contemporaneous possession, their exclusion indicates a confusion of the popular with the technical import of the word "narrative." But a correct analysis shows the problem not to be one of *res gestae* at all. The fact to be proven is the mental attitude of the occupant of the land. As circumstantial evidence of this, evidence whose value lies rather in the inference from the fact of statement than in the truth of what is asserted, the declarations are properly